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13 CHUNGHWA PICTURE TUBES, LTD. AND  
14 CHUNGHWA PICTURES TUBES (MALAYSIA)  
15 SDN. BHD.

16 UNITED STATES DISTRICT COURT  
17 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
18 SAN FRANCISCO DIVISION

19 IN RE: CATHODE RAY TUBE (CRT)  
20 ANTITRUST LITIGATION

21 This Document Relates To:

22 *ViewSonic Corporation v. Chunghwa Picture  
23 Tubes, Ltd., et al.*, No. 3:14-cv-02510-SC

24 Master File No. 3:07-CV-5944 SC  
25 MDL No. 1917

26 **[PROPOSED] ORDER GRANTING  
27 DEFENDANT CHUNGHWA PICTURE  
28 TUBES, LTD. CHUNGHWA PICTURES  
TUBES (MALAYSIA) SDN. BHD.'S  
MOTION TO EXCLUDE LATE-  
DISCLOSED EVIDENCE UNDER  
FEDERAL RULE OF CIVIL PROCEDURE  
37(c)(1)**

29 Date: March 6, 2015  
30 Time: 10 a.m.  
31 Judge: Hon. Samuel Conti

1       On March 6, 2015, the Court held a hearing on Defendants Chunghwa Picture Tubes, Ltd. and  
 2 Chunghwa Picture Tubes (Malaysia) Sdn. Bhd.'s (collectively, "Chunghwa") Motion To Exclude  
 3 Late-Disclosed Evidence Under Federal Rule Of Civil Procedure 37(c)(1). The Court having  
 4 considered all papers filed in support of and in opposition to said Motion, and having entertained  
 5 argument of counsel, and good cause appearing, HEREBY ORDERS that the Motion is GRANTED  
 6 in its entirety.

7       On August 25, 2014, Chunghwa served several interrogatories requesting that ViewSonic  
 8 Corporation ("ViewSonic") identify all facts, documents, and witnesses relating to its ownership and  
 9 control contentions under the *Royal Printing* exception, which allows an indirect purchaser to bring a  
 10 Sherman Act claim when it purchased the price-fixed product from an entity owned or controlled by  
 11 a price-fixing conspirator. ViewSonic served its responses on October 13, 2014, identifying certain  
 12 documents. ViewSonic did not identify any witnesses. ViewSonic did not supplement these  
 13 responses, and discovery closed on November 7, 2014.

14       On November 14, 2014, Chunghwa moved for partial summary judgment against  
 15 ViewSonic's Sherman Act claim to the extent it is based on purchases from Tatung Company or Jean  
 16 Company, Ltd. because indirect purchaser claims are prohibited under federal law. In response,  
 17 ViewSonic argued that its indirect purchaser claim is not barred because the *Royal Printing* exception  
 18 applies. In making this argument, ViewSonic relied on documents and a witness that it failed to  
 19 identify in its discovery responses, despite discovery requests from Chunghwa that required  
 20 ViewSonic to identify all evidence in support of its *Royal Printing* argument:

- 21       • Heaven Decl., Exhibit 2 (TCO 2014 Annual Meeting of Shareholders Handbook)
- 22       • Heaven Decl., Exhibit 5 (CPT Corporate Governance document)
- 23       • Heaven Decl., Exhibit 7 (Declaration of Ernest Huang)
- 24       • Heaven Decl., Exhibit 10 (Tatung Corporate Milestones)

25       These documents and the declaration of Mr. Huang were submitted in support of ViewSonic's  
 26 contention that an ownership or control relationship existed between Chunghwa, Tatung, and Jean,  
 27 and should have been disclosed in response to Chunghwa's discovery requests. ViewSonic's failure  
 28

1 to disclose the documents and witness identified above during discovery also violated Federal Rule of  
 2 Civil Procedure 26(e)(1)(A), which requires timely supplementation of discovery responses.

3 Under Rule 37(c)(1), ViewSonic is precluded from using this evidence: “If a party fails to  
 4 provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to  
 5 use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the  
 6 failure was substantially justified or is harmless.” Fed. R. Civ. Proc. 37(c); *see also Hoffman v.*  
 7 *Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1179-80 (9th Cir. 2008) (affirming exclusion of  
 8 evidence of damages calculation under Rule 37(c) as sanction for nondisclosure); *Wong v. Regents of*  
 9 *Univ. of Cal.*, 410 F.3d 1052, 1059-62 (9th Cir. 2005) (affirming exclusion of opinions and other  
 10 evidence from experts submitted in support of plaintiff’s opposition to motion for summary judgment  
 11 as sanction under Rule 37(c) for nondisclosure, and granting summary judgment).

12 The Ninth Circuit has described Rule 37(c)(1) as a “self-executing, automatic sanction to  
 13 provide[] a strong inducement for disclosure of material.” *Yeti by Molly, Ltd. v. Deckers Outdoor*  
 14 *Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001) (quoting Fed. R. Civ. Proc. 37 advisory committee’s note  
 15 (1993)) (internal citations omitted); *see also id.* (noting that the implementation of this rule in the  
 16 1993 amendments “clearly contemplates stricter adherence to discovery requirements, and harsher  
 17 sanctions for breaches of this rule”). And “[c]ourts have upheld the use of the sanction even when a  
 18 litigant’s entire cause of action or defense has been precluded.” *Id.* The Court is not required to  
 19 make a finding of willfulness or bad faith to exclude undisclosed evidence. *Hoffman*, 541 F.3d at  
 20 1180.

21 ViewSonic has not met its burden to demonstrate that the exceptions to Rule 37(c)(1)  
 22 sanctions apply—i.e., that its failure to comply with Rule 26(e) was “substantially justified” or  
 23 “harmless.” *See Yeti*, 259 F.3d at 1107 (“Implicit in Rule 37(c)(1) is that the burden is on the party  
 24 facing sanctions to prove harmlessness.”); Fed. R. Civ. Proc. 37(c)(1). The identity of these  
 25 documents and witness was directly responsive to Chunghwa’s interrogatories and there is no  
 26 justification for ViewSonic’s failure to disclose them. Further, Chunghwa has been prejudiced by  
 27 the inability to depose Mr. Huang, or to ask any ViewSonic witness in deposition about the  
 28 documents upon which ViewSonic relies. That is problematic given that Chunghwa’s discovery was

1 directed at the very issue upon which it moved for summary judgment. Finally, given the proximity  
2 of the summary judgment rulings and trial, exclusion of this evidence is the only appropriate remedy.  
3 If ViewSonic were allowed to cure its violation by re-opening discovery, “the rest of the schedule  
4 laid out by the court months in advance, and understood by the parties, would have to have been  
5 altered as well.” *Wong*, 410 F.3d at 1062. “Disruption to the schedule of the court and other parties  
6 in that manner is not harmless.” *Id.*

7 Accordingly, exclusion of the evidence as a sanction under Rule 37(c) is appropriate.  
8 The Court hereby excludes Heaven Declaration, Exhibits 2, 5, 7, and 10 from the summary judgment  
9 record. The Court further orders that ViewSonic is precluded from using these documents at trial.

10 **IT IS SO ORDERED.**

11  
12 DATED: \_\_\_\_\_

13 Honorable Samuel Conti  
U.S. District Judge